CEO 09-8 -- April 27, 2009

CONFLICT OF INTEREST

FLORIDA HOUSE MEMBER ENGAGING IN VARIOUS EMPLOYMENT AND BUSINESS RELATIONSHIPS

To: Mark Herron, (Attorney, Tallahassee)

SUMMARY:

Article II, Section 8(e), Florida Constitution, and Section 112.313(9)(a)3, Florida Statutes, would not be violated by member of the Florida House of Representatives' personal representation of businesses before local government entities, because such entities are not "State agencies." The member would not have an employment or contractual relationship with an agency or business entity subject to the regulation of his agency (the Legislature) within the meaning of Section 112.313(7)(a), Florida Statutes, and the his activities are not linked to his legislative position such that a continuing or frequently recurring conflict or impediment to duty would be created. The member is advised to keep separate his private interests from his public responsibilities, thereby avoiding allegations of misuse of position or disclosure or use of certain information; any voting conflicts of interest that may develop require disclosure, rather than abstention.

QUESTION:

Would a prohibited conflict of interest exist were a member of the Florida House of Representatives to enter into a consulting arrangement with engineering firms or a hedge fund to develop clients which include local government entities, or to be employed to market health care funding opportunities to public and private hospitals?

Your question is answered in the negative, under the circumstances presented.

You write on behalf of Franklin Sands, a member of the Florida House of Representatives. You advise that the member is considering four employment or business opportunities:

- a consulting relationship, through his consulting business, with a national engineering firm providing environmental engineering, science, and consulting services to public and private clients.
- a consulting relationship, through his consulting business, with an environmental engineering and consulting firm providing services to municipal, federal, and private agencies.
- a consulting relationship, through his consulting business, with a hedge fund, to cultivate relationships between investors and the fund. Potential investors may

include local government pension funds and local government entities that engage lobbyists who lobby the Legislature.

You state that the member's responsibilities with these entities would be to develop business opportunities for the firms with local government entities, some of which have lobbyists who lobby the Legislature. In addition, you advise that with respect to the engineering firms, the Legislature may make appropriations decisions on funding for some of the projects with which the firms may seek involvement.

You advise that the member is also considering:

- personal employment with an LLC to market a "health care funding opportunity" to public and private hospitals, under which a client of the LLC will purchase, at a discount, health insurance claims submitted by the hospitals but denied by the insurance company, and then negotiate with the insurance company that denied the claim to obtain payment. You advise that some of the hospitals may have lobbyists who lobby the Legislature.

The Code of Ethics does not explicitly prohibit particular occupations, professions, or employment for members of the Legislature or for any other public officer or employee. However, the *possibility* of a conflict exists in any number of employment and professional opportunities. As you have not provided details as to the member's activities with the proposed employment/business relationships, if indeed these details are known or even knowable at this point, general guidance is all we can afford you.

Article II, Section 8(e), Florida Constitution, provides, in pertinent part, that, "No member of the legislature shall personally represent another person or entity for compensation during term of office before any state agency other than judicial tribunals," a proscription echoed in Section 112.313(9)(a)3, Florida Statutes. Accordingly, the member is prohibited from representing, for compensation, any of the entities that he contemplates associating with, or their clients, before any State agency. We have on several occasions recognized that this prohibition does not preclude representation before cities, counties, and other local governmental bodies. See, CEO 83-13, CEO 88-68, and CEO 89-6. In CEO 88-68, which concerned a State Representative's employment as the executive director of a nonprofit corporation formed to represent the interests of landowners in a part of his district, we cautioned:

> The Sunshine Amendment's prohibition clearly was not intended to preclude a legislator from representing his constituents' interests through contacting State agencies, as it expressly prohibits only representations of another 'for compensation.' However, where a legislator is being compensated as an employee on an ongoing basis to represent his employer's interests before governmental agencies, we find it extremely difficult to draw a line distinguishing representation in a legislative capacity of these interests as being constituent matters, as there is at least the appearance of being compensated for contacts with State agencies regardless of whether the legislator formally indicates that he is acting in his legislative capacity. Therefore, we suggest if you accept employment as executive director of the nonprofit corporation, that you refrain from contacting State agencies regarding matters which would directly benefit members of the

> corporation, in which the corporation has expressed an interest, or about which you may be contacting local agencies as executive director.

Accordingly, we find that the member is not prohibited from appearing, for compensation, before local government entities in an effort to cultivate business relationships for a business employing him or with which he is affiliated. However, we reiterate the admonition expressed in CEO 88-68 that he refrain from contacting State agencies regarding matters which would directly benefit those businesses, in which they have expressed an interest, or about which he may be contacting local agencies.

Section 112.313(7)(a), Florida Statutes, provides:

> CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.—No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee . . .; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

The first part of Section 112.313(7)(a) prohibits the member from having a contractual relationship with any business entity doing business with or regulated by his agency, the Legislature. See, CEO 87-2. Nothing in your request suggests that any of the companies with which the member will be associated is doing business or considering doing business with the Legislature. To the extent that any of the entities are regulated by the Legislature, an exemption is provided by Section 112.313(7)(a)2, Florida Statutes.[1]

The second part of Section 112.313(7) prohibits the member from having *any* contractual relationship which would create a continuing or frequently recurring conflict between his private interests and the performance of his public duties, or would impede the full and faithful discharge of his public duties. This provision establishes an objective standard which requires an examination of the nature and extent of the public officer's duties together with a review of his private employment to determine whether the two are compatible, separate and distinct, or whether they coincide to create a situation which "tempts dishonor." Zerweck v. Commission on Ethics, 409 So.2d 57 (Fla. 4th DCA 1982). You have indicated that the member plans to "cultivate" clients for each of the entities he will

[1] This provision states:

> When the agency referred to is a legislative body and the regulatory power over the business entity resides in another agency, or when the regulatory power which the legislative body exercises over the business entity or agency is strictly through the enactment of laws or ordinances, then employment or a contractual relationship with such business entity by a public officer or employee of a legislative body shall not be prohibited by this subsection or be deemed a conflict.

be working with from both the private and public sectors, and that many of the public sector clients employ lobbyists who lobby the Legislature.

We appreciate that there may be a tension between the responsibility to approach legislative decision-making objectively and the temptation to acquire or retain clients by taking legislative action in that client's favor, particularly where the very projects which will generate work for the member's associates or employers may be dependent upon Legislative action. Nevertheless, the mere possibility that such a circumstance could arise is insufficient to find a prohibited conflict. We base our judgment in this respect on the following:

First, Section 112.313(7) speaks not to the mere possibility of a conflict, but to a "continuing or frequently recurring" conflict, or an impediment to public duty. In CEO 91-31, we dealt with a question from a county engineer who served as co-trustee of a family trust that owned substantial amounts of undeveloped real property located along the proposed routes of county road projects, but who had taken steps to distance himself from matters related to the property. We said,

> Notably, [Section 112.313(7)] does not prohibit a public employee from having employment or a contractual relationship that would create any conflict of interest whatsoever. The term "conflict of interest" is defined in Section 112.312(6), Florida Statutes, as meaning "a situation in which regard for a private interest tends to lead to disregard of a public duty or interest." The Legislature easily could have phrased the statute as prohibiting "any employment or contractual relationship that would create a conflict of interest," but it clearly has not done so. Rather, the law prohibits only those employments and contractual relationships that will create a continuing or frequently recurring conflict or that would impede the full and faithful discharge of public duties.

We concluded,

> . . . although there were or might be expected to be occasional instances when the authority and responsibilities of the Engineering Department would affect the value of the properties held by the trust, thus bringing your public duties into potential conflict with your duties as a co-trustee, we do not find that these were so frequently recurring or of such a substantial nature as to require you to resign as co-trustee or as County Engineer.

Second, given the scope of the Legislature's authority, almost any type of employment or contractual relationship a member may engage in carries with it the potential for a conflict of interest. Yet we observed in CEO 93-24, "As the members of the Legislature are expected to serve as citizen-legislators on a part-time basis and must be employed elsewhere to support themselves and their families, each private employment or business endeavor of a legislator presents the potential for conflicts of interests." This being the case, we cannot say that any employment which could, under certain circumstances, give rise to a temptation to disregard public duty, violates the second part of Section 112.313(7). In CEO 03-11 we advised that no prohibited conflict of interest would exist under the second part of Section 112.313(7), where a State Senator/attorney represented a client (a hospital) before county commissions and in various

other matters not involving the Legislature, and also participated in legislation affecting the hospital. We pointed out that, "In our view, the ethical concerns raised by your situation are similar to those raised whenever a member of the Legislature contracts with or is employed by an entity that is represented before the Legislature." Similarly, in CEO 90-10 we found that Section 112.313(7) would not preclude a State Representative who was Chair of the Committee on Finance and Taxation from employment as a sales consultant with a health care management firm. This was true even though some of the health care providers she would contact in this position would be special districts established by special acts of the Legislature, and she might be presented, in her capacity as Committee Chair, with proposals benefitting a particular hospital or district which could be a client of her firm.

We directed her attention, as we do the member's, to the following provisions of the Code of Ethics:

> MISUSE OF PUBLIC POSITION.--No public officer or employee of an agency shall corruptly use or attempt to use his official position or any property or resource which may be within his trust, or perform his official duties, to secure a special privilege, benefit, or exemption for himself or others. This section shall not be construed to conflict with s. 104.31. [Section 112.313(6), Florida Statutes.]
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> DISCLOSURE OR USE OF CERTAIN INFORMATION.-No public officer or employee of an agency shall disclose or use information not available to members of the general public and gained by reason of his official position for his personal gain or benefit or for the personal gain or benefit of any other person or business entity. [Section 112.313(8), Florida Statutes.]

These provisions prohibit the member from using his official position to gain access to information which would not be available to the general public, and from otherwise using his official position in a manner inconsistent with the proper performance of his public duties for the benefit of any of the companies with which he becomes affiliated. Further, as we did in CEO 03-11and CEO 90-10, we suggest that in order to avoid even the appearance of favoritism, the member scrupulously separate his public role from his private pursuits in his interactions with public and private entities which may be affected by legislation.

Finally, with respect to voting, Section 112.3143(2), Florida Statutes applies here. It states, in relevant part:

> No state public officer is prohibited from voting in an official capacity on any matter. However, any state public officer voting in an official capacity upon any measure which would inure to the officer’s special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom the officer is retained or to the parent organization or subsidiary of a corporate principal by which the officer is retained; or which the officer knows would inure to the special private gain

> or loss of a relative or business associate of the public officer shall, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes.

As a State officer, the member is never required to abstain from voting by this provision. Rather, he is required to make disclosure when voting on measures which would inure to his own "special private gain or loss" or which he knows would inure to the "special private gain or loss" of a relative, business associate, or principal.

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on April 24, 2009 and **RENDERED** this 27th day of April, 2009.

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Cheryl Forchilli, *Chair*